COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Did the District Court properly order the transfer of a capital habeas corpus petitioner from a state prison to a secure mental health facility to determine whether he is competent to proceed with his litigation, when his appointed attorneys presented overwhelming and undisputed evidence that he is psychotic and likely incompetent and where the state did not challenge the evidence of mental illness through given the opportunity to do so?

(Answered affirmatively by the Court of Appeals for the Third Circuit)

2. Did the Court of Appeals for the Third Circuit properly conclude that the order of the District Court was not subject to interlocutory appeal because it did not implicate any of the exceptions to the rule of Cohen v. Beneficial Industries Loan Corp., 337 U.S. 541 (1949).

(Answered affirmatively by the Court of Appeals for the Third Circuit)

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COUNTER STATEMENT OF THE CASE[1]

A. Introduction.

Contrary to Petitioners' assertions, this case does not present a controversial question. This case is not about "the national debate over the death penalty." *Petition For Writ of Certiorari*, at 14 (hereafter, *Petition*). Nor does it present "a disquieting paradigm" in the implied distortion of capital jurisprudence. Id. The District Court's order is not a so-called "Vitek commitment order" since, as the Court of Appeals noted, "Vitek involved an open-ended civil commitment and involuntary treatment unrelated to any ongoing court proceedings rather than an inpatient evaluation for the limited purpose of determining competence to assist counsel." Pierce v. Blaine, 467 F.3d 362, 371 (3rd Cir. 2006).

This case does not present an issue of involuntary treatment, forcible medication or any other invasive procedure. Rather, the District Court ordered a routine competency evaluation based upon "reasonable cause" to believe Mr. Pierce may be incompetent and unable to rationally assist current habeas counsel. When the order is implemented, "[P]ierce will be transferred for observation and evaluation. He may voluntarily agree to be interviewed . . . or he may even agree to some form of therapeutic intervention, but if he refuses to participate, then all that will happen to him is that he will be housed in a custodial setting and observed, just as he is now." Pierce, 467 F.3d at 371.

Petitioners (the Commonwealth of Pennsylvania, hereinafter referred to as the Commonwealth) ignore the overwhelming evidence of Mr. Pierce's incompetence and instead insist that the District Court was bound by stale and inadequate competency determinations made in the state courts well over a decade prior to the District Court's order. Moreover, the law relied by the

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[1]All emphasis herein is supplied unless otherwise noted.

upon by the Commonwealth is neither applicable nor even analogous to the situation presented in this case, as the Third Circuit held.

For example, contrary to the Commonwealth's assertion that none of Mr. Pierce's state court counsel believed him to be incompetent and delusional, Pierce's trial counsel, argued to the jury that Pierce was "acting under some delusional state" and that "that he did not understand what he was doing," recognized Mr. Pierce to be profoundly mentally ill. Pierce, 467 F.3d at 364 (trial counsel "[i]mplored the jury to consider that Pierce was out of touch with reality and mentally ill at the time of the offense, but she did not seek to have Pierce evaluated by a mental health professional, nor did she seek a competency evaluation or an inpatient commitment").[2]

Indeed, the Court of Appeals, upon review of the entire record, concluded that "Pierce's competence to stand trial and unyielding negative views about a psychiatric approach to his defense were issues from the beginning of the criminal proceedings." Pierce, 467 F.3d at 364.

Contrary to the Commonwealth's arguments, this case does not implicate deference to prior state court findings of competence because there was never a state court hearing conducted on the subject of his competence.[3] Although a brief competency evaluation took place in 1989,[4] the "presumption of correctness, even for [a] purely historical fact ... does not apply when some reason

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[2]Mr. Wallace, another one of Mr. Pierce's state court attorneys, twice moved for a competency evaluation.

[3]Mr. Pierce was not repeatedly found competent by the state court. *Petition*, at 5 ("Pierce was repeatedly found competent to make his own decisions"). The only notation in the state court record concerning competency is a statement made by the prosecutor during a pre-trial hearing that "on 12/8/89, the defendant was found competent, and Mr. Wallace requested a continuance for further preparation." Notes of Testimony (hereafter, NT) 10/16/90, 20.

[4]Although three competency evaluations were ordered, Pierce refused to participate in all but one. This evaluation took place on November 20, 1989.

to doubt the adequacy or the accuracy of the fact-finding proceeding exists." Barnett v. Hargett, 174 F.3d 1128, 1136 (10th Cir. 1999) (internal quotation marks omitted); see also Miller-El v. Cockrell, 545 U.S. 231 (2005). Even if the state court finding was based on otherwise proper procedure, this finding is unquestionably stale; stands contradicted by the wealth of more recent evidence presented to the District Court; it was reached without benefit of any collateral data, records, or family history about Mr. Pierce (other than a print out of the charges he faced); and is of dubious value. See Brown v. Sternes, 304 F.3d 677, 697 (7th Cir. 2002) (competency evaluation conducted without information concerning defendant's background and medical history renders conclusion of competency "[u]seless and unreliable").[5] See also Appel v. Horn, 250 F.3d 203, 216-17 (3d Cir. 2001) ("Nor do we believe it would impose an undue burden on defense counsel to require some investigation into the defendant's competency, especially in a capital murder case where the trial court has ordered a competency evaluation and hearing").

Moreover, the state court findings of competency – such as they are – are far from reassuring, as demonstrated by the state court's inability to recognize blatant indica of mental illness and delusional, paranoid thought content expressed by Mr. Pierce in his one and only colloquy in state court, where he was questioned concerning his desire to discharge yet another attorney:

> That's what I wanted to tell you. I wanted to say this on the record, but I will say it now, I wanted to say it, it's really disturbing, like you could have a problem between staff and prisoners, **but since I have been filing my habeas corpus in February of 1998, I've been threatened by the prison guards, even before that, they would kill me if I didn't stop appealing my criminal appeal.**
>
> And I brought this to the attention of the prison staff, and I filed two lawsuits. One

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[5]The court in Brown also noted that "[i]t is the imprecise nature of the science known as psychiatry that makes review of the past available psychiatric records an essential part of defendant's competency to stand trial." Brown v. Sternes, 304 F.3d at 696.

is pending in the Third Circuit Court of Appeals and the other is in the U.S. District Court in the Western District of Pennsylvania in federal court. **They threatened to kill me, threatened to rape me while I'm asleep on medication**.

NT 11/10/99, 9-10. Despite the deluded nature of Pierce's response, and his assertion that guards were threatening to kill him if he proceeded with his appeals, the state post-conviction found him competent to make this "knowing, intelligent and voluntary" waiver of his right to counsel.[6]

The Court of Appeals correctly concluded that the District Court's order committing Mr. Pierce to a secure psychiatric facility for an evaluation of his competency to rationally assist habeas counsel does not fit within the narrow confines of the collateral order doctrine and thus is not appealable. Pierce, 467 F.3d at 368. Rather, the District Court, presented with what the Court of Appeals characterized as "a reasonably strong showing that Pierce was acutely ill in 2002" at the time the *Petition for Involuntary Commitment* was presented to it, properly ordered an in-patient competency evaluation based upon the extensive record before it. See *District Court Memorandum* (A-10)[7] ("The record attached to the petition...gives rise to the belief that Petitioner might presently be incompetent and thus unable at present to rationally assist counsel"); Pierce, 467 F.3d at 367 ("Finally, Dr. Fox expressed opinions...importantly for our purposes here, that [Pierce] is currently unable to assist habeas counsel. He added that if he had seen Pierce in a civil context, he would have opined that Pierce required a conservator or guardian to prosecute, protect or handle his affairs").

The Commonwealth, on the other hand, does not want Mr. Pierce examined for competency. Nor does it wish for mental health professionals to review the voluminous and uncontradicted

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[6]Mr. Pierce has attempted to dismiss every single lawyer appointed to represent him, including undersigned counsel.

[7]Citations that begin with "A" refer to the Appendix filed in the Court of Appeals by the Commonwealth in connection with its interlocutory appeal.

records, witness statements and affidavits proving Mr. Pierce was profoundly mentally ill and impaired before, at and after the time of his capital trial. And the Commonwealth particularly does not want any mental health professional to spend an extended period of time speaking with or observing him. Such evaluations will likely lead to a finding that Mr. Pierce is not competent to proceed. The Commonwealth's self-serving invocation of Pierce's liberty interest and right to due process is disturbing and perverse – after all, the Commonwealth seeks to execute him. There is nothing about the District Court's order that implicates those concerns, and, in any event, the Commonwealth has no standing to raise them.

B. Relevant Procedural History.

Michael Pierce is a death-sentenced prisoner in the custody of the Commonwealth of Pennsylvania. On October 30, 1990, he was convicted of three counts of first-degree murder, arson, aggravated assault, recklessly endangering another person, and risking a catastrophe as a result of a fire that killed his parents and grandmother. After a brief penalty hearing he was sentenced to death.

The Pennsylvania Supreme Court denied Petitioner's direct appeal. Commonwealth v. Pierce, 645 A.2d 189 (Pa. 1994). The state trial court denied post-conviction relief and that denial was affirmed on appeal by the Pennsylvania Supreme Court. Commonwealth v. Pierce, 786 A.2d 203 (Pa. 2001).

On January 31, 2002 Mr. Pierce filed a *pro se* petition for a federal writ of habeas corpus. The District Court appointed undersigned counsel to represent Mr. Pierce in his capital habeas corpus proceeding. Counsel, who had no prior involvement with Mr. Pierce or his case, began to do what post-conviction counsel are required to do in cases such as this: they repeatedly met their

client and tried to speak with him about his case; they gathered records about him, including researching a number of prior law suits that he filed and obtaining records maintained by the prison authorities; they interviewed family members and those who knew him before the offenses; and they reviewed the state court proceedings. After taking these basic steps, counsel found indisputable evidence that their client is severely mentally ill and incompetent to assist counsel in the litigation of his habeas petition. It became clear to counsel that Mr. Pierce was incompetent and that his mental illness prevented him from understanding or assisting in his litigation.

Accordingly, undersigned counsel filed with the District Court a *Petition For Involuntary Commitment To A Forensic Psychiatric Facility For Long-Term Evaluation* (hereinafter *Petition For Involuntary Commitment*). Specifically, counsel asked the District Court to "[t]ake appropriate steps to have Petitioner evaluated to determine his competency to proceed in this litigation." *Petition For Involuntary Commitment*, at 1(District Court Document # 30).

The District Court, after reviewing the overwhelming documentary evidence presented by undersigned counsel, including contemporaneous reports from four mental health professionals (Drs. Fox, Sadoff, Rotenberg and Tepper) granted the *Petition For Involuntary Commitment* and "invited the Commonwealth to identify a forensic psychiatrist to participate in an evaluation of Pierce's current competence to participate in his capital habeas litigation." Pierce, 467 F.3d at 367. The Commonwealth declined to do so, and instead filed a motion for reconsideration. In denying this motion, the District Court stated the obvious: "it seems to me that reasonable people would agree that based upon the record in this case, the petitioner needs the evaluation ordered by the court..." Id.

As the following summaries show, the evidence is clear that Mr. Pierce is mentally ill,

delusional and psychotic. All of the following materials were provided to the District Court in support of the counsels' request that Mr. Pierce be temporarily committed for a mental health evaluation to determine competency.

C. Evidence of Mr. Pierce's Current Incompetence.

In preparing to file the Petition for a Writ of Habeas Corpus, undersigned counsel gathered the following evidence showing that Mr. Pierce is not competent, or at a minimum, his competency must be inquired into before the District Court could further proceed.

1. Counsels' Communications with Mr. Pierce.

Counsel and their investigator, Cindy Rowe, met with Mr. Pierce on numerous occasions. These meetings were fruitless because Mr. Pierce was not able to discuss his case in a rational way. Investigator Rowe recalls her meetings with Mr. Pierce, and how, instead of discussing his case, he stated that:

> [H]e is being tortured, raped and experimented on by a host of government entities, including personnel from SCI Greene Prison, the FBI, the Justice Department, The State of Pennsylvania and the City of Philadelphia.

Declaration of Cindy Rowe, A-509. Ms. Rowe's declaration also describes how Mr. Pierce believed that all attorneys who have ever represented him in his capital case "were all working in conjunction with the Commonwealth to secure his conviction and insure the carrying out of his death." Id. He told Ms. Rowe that he was being "sodomized nightly by prison staff" (id.); that prison guards were making "alterations" to the "structure of his face;" that "hair was being removed from various parts of his body via electrolysis" (id.); and that a "computer chip capable of monitoring and controlling his thoughts was implanted in his brain when he was sent to a hospital by the Department of Corrections." A-510. Ms. Rowe recounted how Mr. Pierce confused time frames, and was not sure

of the year that they had met. He told her that he'd met her two years before they actually met for the first time. A-512. Ms. Rowe concluded:

> It has been impossible to work with Mr. Pierce on the substance of his capital case. In all of the time I spent with him, he was unable to relate to me any non-delusional information related to his case, other than repeating that all of the witnesses had lied. His entire focus was on the conspiracy against him by his attorneys and on the behavior of guards, and the government . . . Without question, in my mind, he was not able to rationally assist me in my attempts to help him.

A-513. His meetings with counsel were similar. *See Petition for Involuntary Commitment* at ¶ 44.

2. Civil Law Suits Filed by Mr. Pierce.

Counsel also researched Mr. Pierce's legal history. What counsel found was significant. Mr. Pierce has filed numerous civil law suits in federal court, each of which is notable for its delusional content. He has alleged that prison guards anesthesize him while he sleeps and perform bizarre surgical procedures on him designed to alter his appearance, such as plastic surgery and hair removal. See Pierce v. William J. Love, J.C. Blair Medical Center, Doctor Reinhart, June 24, 1993 (M. D. Pa.) (Complaint) ("highly sofisticated (sic) electronic devices were placed under plaintiff's skin" by guards) (A-450); Pierce v. Sgt. Markley, CO Hyde and Love, June 24, 1993 (M.D. Pa.) (Complaint) ("Plaintiff was sexually violated by prison staff members CO Hyde & Sergeant Markley on the 2pm to 10pm shift of B-Block by drugging plaintiff's food & performing an illegal cavity search, which caused plaintiff to bleed from rectum and continued to do so over a period of one and a half years") (A-454); Pierce v. Love, 1992 WL 220983 at *1 (E.D. Pa. Aug. 31, 1992) (Petitioner alleging that he has been "mutilated" by correctional personnel cutting off his hair without permission) (A-456).

United States Magistrate-Judge Benson (sitting in the United States District Court for the

Western District of Pennsylvania, where Mr. Pierce has been incarcerated for much of his time on death-row) has adjudicated many of Mr. Pierce's civil complaints. In Pierce v. Johnson, 98-1787 (W.D. Pa. December 7, 1998), Magistrate Benson summarized Pierce's allegations as follows:

> [H]e began noticing some bruises and scrapes on his arms and legs when he woke up. He claims that typically this occurred when he was given medication in powder form. . . [P]laintiff woke up with what appeared to be a human bite mark on his left leg and a bruise on his right leg. **Plaintiff fears that prison staff are drugging him and injuring him in his sleep**. . . [P]laintiff alleges that he 'mysteriously' contracted poison ivy or poison oak or poison sumac in February of 1998, which was misdiagnosed as atypical dermatitis, that a very strong chemical smell[8] was coming into his cell in August of 1998 and that a guard continued to shine a pen light into his eyes after he complained that the light might damage his eyes. Plaintiff complains that although he has not had a haircut since early 1993, his hair grows mysteriously shorter.

Magistrate-Judge's Report and Recommendation, at 3 (A-468).

In another, more recent, action, Pierce v. Blaine, Civil Action No. 00-2275 (W.D. Pa. April 3, 2001) Magistrate-Judge Benson wrote:

> [P]laintiff makes the same type of **fantastical** allegations that he has been asserting in the federal courts since at least 1992. *See, e.g., Pierce v. Love*, 1992 WL 220983, at *1 (E.D. Pa. August 31, 1992) ("Plaintiff alleges that 'since being sentenced and arriving at state institution I have been subjected to general harassment, terrorism, libel, theft of personal property, and mutilation to humiliate me (by cutting off sections of my hair)' . . . In addition, plaintiff alleges that: (he has been given poison ivy on numerous occasions although he does not go outside; 2) his left nostril was enlarged by 1/8 inch, which had to have been done by a laser; 3) a strong chemical smell comes into his cell from the vent; 4) his eye was damaged when a laser pen light was used to check a tear duct; and 5) a substance was put on his face and cheeks, which made his smile look lecherous.'").

Magistrate-Judge's Report and Recommendation at 2 (A-479).

When Mr. Pierce appealed the adverse disposition of this suit, **Pennsylvania's Attorney**

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[8]Petitioner proffered in the District Court that olfactory hallucinations are symptomatic of schizophrenia. *Petition*, at ¶ 28, n.6.

General aptly characterized his allegations as "**delusional and fantastical.**" *Reply in Opposition to Plaintiff's Motion for Imminent Danger Exception to PLRA*, filed in *Pierce v. Blaine*, 01-3054 (3d Cir. August 22, 2001) (A-485).[9]

3. Records Maintained by the Pennsylvania Department of Corrections.

Counsel obtained mental health and medical records complied by mental health and medical providers, counselors and guards, employed by the Pennsylvania Department of Corrections ("DOC"). Since the purpose of these records was to monitor and treat – if possible – Mr. Pierce's behavior and mental illness, the conclusions contained within them are particularly probative of his mental impairments and incompetency. Excerpts from these records, spanning about a decade, are summarized as follows[10]:

1/3/92, Referral to Neurologist, head injury in prison riot in October 1989 (A-317);

9/30/92, Psychiatrist, "**hallucinations and paranoid ideation**"(A-313);

10/16/92, Psychiatrist, "still hearing voices...making comments which are somewhat upsetting" (A-311);

7/16/93, Psychiatrist, "**claims that Cos[11] are cutting off his hair and persecuting him.** Sounds like suspiciousness associated with paranoid thinking..."(A-302);

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[9]Mr. Pierce had been previously sanctioned pursuant to 28 U.S.C. § 1915(g) for filing three or more lawsuits that were found to be frivolous, malicious or which failed to state a claim. He was thus only permitted to file a new suit if he alleged that he was in "imminent danger of serious physical injury." Id.

[10]The Cumulative Adjustment Reports from April 23, 2003 through August 1, 2003 are not included in the *Joint Appendix*. However, they were provided to the District Court as an attachment to *Petitioner's Reply to Respondents' Response Regarding Motion for Involuntary Commitment* (District Court document # 38). Petitioner has included them in a *Supplemental Appendix*, filed with the Court of Appeals.

[11]Shorthand reference to "corrections officers."

12/3/93, Psychiatrist, "he has gotten into some difficulties for trying to mail **underwear that was bloodstained out of the institution claiming it was evidence**" (A-294);

2/24/94, Psychiatrist, "takes meds to prevent delusional thinking"(A-294);

12/8/94, Individual Tx Plan, "Mellaril 100mgs; claims his attorney is working with the prosecuting attorney" (A-279);

3/10/95, Psych Report, "Mellaril 150 mgs (Notes that 100 mg insufficient dose to keep away psychotic symptoms" (A-278);

9/11/96, Health Information, history of substance abuse including cocaine and ETOH (SA-004);

12/3/98, Cumulative Adjustment Record, "**Anxious, suspicious, projections, fragmented memory; thought impairment** (A-271);

12/31/98, Cumulative Adjustment Record, "**impairment in thought**" (A-270);

1/28/99, Cumulative Adjustment Record, "Anxious affect; **impairment in fact**" (A-270);

7/6/99, Cumulative Adjustment Record, "he often presents an **intact delusional system** that occasionally causes him stress" (A-265);

7/13/99, Cumulative Adjustment Record, "**thought process delusional in nature**" (A-264);

8/30/99, Psychology Department Referral Form, "[H]e believes staff are cutting his hair while he sleeps. **Inmate exhibits signs of delusional thought processes and growing paranoid in regards to treatment by staff**" (A-256);

11/2/99, Cumulative Adjustment Record, "**impaired to reasonable decisions**" (A-258);

12/26/06, Cumulative Adjustment Record, "**delusional thought pattern**" (A-261);

2/20/01, Cumulative Adjustment Record, "**His speech is rambling in nature making accusatory** statements about the actions of staff towards him. **Thought content was not logical in nature. Refused any psychiatric intervention**" (A-253);

11/1/01, Cumulative Adjustment Record, "**continues to present paranoid thought**

patterns" (A-250);

1/15/02, Cumulative Adjustment Record, "**Bizarre appearance, anxious, suspicious, projections, memory fragmented, impaired thoughts and feeling. Narrative: exhibits paranoid symptoms claiming that writer lies about his situation**";

4/23/03, Cumulative Adjustment Record, "**Still claims that he is being raped and sodomized, hair is being cut, mail is being stolen, claims staff is false** (SA-001);

7/24/03, Cumulative Adjustment Record, "Food trays being tampered with" (SA-002) (emphasis added).

4. State Court Proceedings.

The state court record (both trial and post-conviction) reveals significant indicia of Mr. Pierce's mental illness.

a. Witness Statements and Testimony Showing Mental Illness.

Mr. Pierce's sister, Joan Pierce, testified for the Commonwealth both pre-trial and at trial, that Mr. Pierce believed his parents were trying to poison him by placing steroids and drugs in his food. NT 8/10/89, 10, 22.

Ms. Pierce also testified to Mr. Pierce's bizarre behavior just days before the offense when she found her brother lying drunk in a deserted building on the grounds of the vacant Byberry State Hospital. NT 10/24/90, 62. She testified that earlier that night Mr. Pierce had consumed at least eight cans of beer. Id. at 53. She found him propped up against the wall, oblivious to the melting wax dripping onto his head from a candle he had earlier lit. Id. at 63. Other than the candle, the only other possession he had with him was a bag of beer. Id. at 64.

Timothy O'Reilly was with Joan Pierce when she found Mr. Pierce, whom he described as "[a]ll in the bushes with stickers and wax all over him and dirt, and he was messed up . . . beyond

drunk." NT 10/29/90, 517.

Indicia that Mr. Pierce suffered psychiatric problems were also apparent from review of the discovery provided to trial counsel by the Commonwealth. Mr. O'Reilly told the police that Mr. Pierce had been treated in the past by psychiatrists and also described Mr. Pierce's rambling and nonsensical rantings in the days before the offense. *See Investigation Interview Record of Timothy O'Reilly*, dated July 10, 1989, at 6 (A-432). Mr. O'Reilly also described Mr. Pierce's delusional paranoid belief that his parents were conspiring against him:

> He is **paranoid** about them, he always says that they are conspiring against him to keep him from getting a good job. He has gone back and forth between here and Los Angeles and he would say that they are **conspiring** against him out there.

Id. at 1 (A-427). Additionally, Mr. O'Reilly told police that Mr. Pierce had discussed killing his parents and committing suicide.[12] Id. Finally, Mr. O'Reilly described how, the week before the fire, Mr. Pierce had destroyed all of his furniture and stereo equipment in order to keep it out of the hands of his parents:

> [h]e had furniture in their house from when he was married and in L.A.. Before he left from his parents house, he broke up the furniture, slashed it up, smashed up his tape deck, slashed his speakers and broke his receiver; he slashed his leather sofa. He said it was so the enemy (his parents) wouldn't have them.

Id. at 2 (A-428). Given that Mr. Pierce did not have a job, a place to live or any other source of income, his bizarre insistence that he destroy his belongings and his talk of suicide also were indications of his illness.

Days before the offense, Mr. Pierce reportedly told Tim O'Reilly's mother, Margaret O'Reilly, that he would have no peace as long as his parents were alive. He talked about harming

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[12] Evidence of suicidal ideation is a red flag for incompetence. See Drope v. Missouri, 420 U.S. 162, 182 (1975).

them. When she challenged him that if he did something he would get caught, Mr. Pierce responded with the bizarre suggestion that he would not be caught because he intended to flee to Indonesia, "because I figure I'd blend in better there" (NT 10/25/90, 193).

b. State Court Competency Proceedings and Relationships with State Court Counsel.

Mr. Pierce's paranoia and impaired mental health dominated his relationships with the attorneys who tried to represent him in state court. Mr. Pierce moved to have two appointed lawyers discharged before trial, because he believed that each was involved in a conspiracy with the prosecution. See *Motion To Withdraw As Court-Appointed Counsel*, dated September 21, 1989, at 1 ("That defendant has telephoned [counsel's] office and left messages alleging that [counsel] is assisting the District Attorney's Office") (A-437).

Michael Wallace was one of the pre-trial lawyers assigned to Mr. Pierce. He believed that Mr. Pierce was incompetent to proceed. Pursuant to Mr. Wallace's request, the state trial court ordered a pre-trial competency determination, which was conducted by Eric Becker, M.D. in November, 1989. This "evaluation" consisted of nothing more than a brief mental status exam. The "information" relied upon by Dr. Becker consisted of a computer-generated "rap" sheet. Dr. Becker opined that Mr. Pierce was competent to proceed to trial (A-62-65)

Understandably unsatisfied, Mr. Wallace made a second request for a competency evaluation. The request was granted and Dr. Pietro Miazzo attempted to assess Mr. Pierce. Again, the reviewing doctor had no collateral information and this time Mr. Pierce refused to cooperate. (A-66–69).

Janis Smarro, the lawyer who eventually tried Mr. Pierce's case, also knew that Mr. Pierce was out of touch with reality and mentally ill. She told the jury so in her penalty phase summation:

> You have to ask yourselves, ladies and gentlemen, **whether...at the time of this incident and the moments before this incident and the week before this incident and even today, Mr. Pierce isn't acting under some delusional state** to, Mr. Pierce, what he believed was real, and that became his reality.
>
> * * *
>
> [i]n his mind, what he believed was reality, you can find that, ladies and gentlemen, to be such a state **that he did not understand exactly what he was doing, that he was suffering from some delusional state, that he was mentally ill...**
>
> * * *
>
> **There was no reality to what Michael Pierce believed**, but he accepted it as true, and I think it was under that state of mind that he committed this act...

NT11/1/90, 1007-08.

Despite these significant indicia of mental illness, and aside from the brief and inadequate evaluation conducted by Dr. Becker, Mr. Pierce was never evaluated by a mental health professional during his state court trial or post-conviction proceedings. The state courts simply allowed him to proceed despite multiple indicia of incompetence, and without a comprehensive or reliable evaluation.

The state court's disregard for Mr. Pierce's disturbed condition is best illustrated by the first and last occasion in which a state court inquired into his competency to make litigation decisions. This occurred in 1999 when Mr. Pierce appeared to waive his right to counsel in regard to a state post-conviction appeal. Mr. Pierce wanted to discharge his state post-conviction appellate attorney (Jules Epstein) and proceed *pro se* on appeal. He appeared before the Honorable David N. Savitt, judge of the Court of Common Pleas in Philadelphia. Judge Savitt asked Mr. Pierce if "anyone promised you anything or threatened you in any way" to waive counsel (NT 11/10/99, 9) (A-544). Mr. Pierce gave the following answer:

> That's what I wanted to tell you. I wanted to say this on the record, but I will say it

> now, I wanted to say it, it's really disturbing, like you could have problems between staff and prisoners, but since I've been filing my habeas corpus in February of 1998, **I've been threatened by the prison guards, even before that, they would kill me if I didn't stop appealing my criminal appeal.**
>
> And I brought this to the attention of the prison staff, and I filed two lawsuits. One is pending in the Third Circuit Court of Appeals and the other is in the U.S. District Court in the Western District of Pennsylvania in Federal Court. **They threatened to kill me, threatened to rape me while I'm asleep on medication.**

(Id., 9-10) (A-544-545).

Remarkably, despite Mr. Pierce's stated belief that guards were threatening to kill and rape him if he did not drop his appeal, the state court **failed to make any inquiry** into these incredible statements: the court allowed Mr. Pierce to discharge counsel and proceed to the Pennsylvania Supreme Court unrepresented – and profoundly mentally ill. The denial of his post-conviction petition was affirmed with this mentally deranged individual acting as his own counsel. *See Commonwealth v. Pierce,* 786 A.2d 203 (Pa. 2001).

c. Additional Pre-Offense Evidence of Michael Pierce's Pre-Morbid Mental Illness.

In their investigation into Mr. Pierce's background, undersigned counsel found additional indicia of his pre-morbid mental deterioration. Although a loner for his adult life, Mr. Pierce had a smattering of acquaintances. One such person is John Carr, who knew Mr. Pierce in high school and from their time together in the Navy. Mr. Carr gave undersigned counsel some insight into Mr. Pierce's decline in the years leading up to the offense:

> I met Michael Pierce in the 1970s when we were both attending Archbishop Ryan High School in Philadelphia. Michael and I later entered the Navy and went through basic training together.
>
> Throughout our high school years, Michael was somewhat of a loner. . . I did not see Michael for a while after the navy. When I did see him, it was in the late 1980s . .

> . Michael looked worse than I had ever seen him. He was disheveled, it looked as though he had not showered in some time, his face looked like it was sunken in, and his hair was a mess.
>
> After Michael's arrest, I started receiving bizarre letters from him. He wrote about employees of the prison drugging him and cutting his head and beard hair, implanting hair in other parts of his body, and of computer ships [sic] being implanted in his head.

Declaration of John Carr, ¶ ¶ 1, 2, 4 & 5 (A-534).

Mr. Pierce's brother, John Pierce, also provided undersigned counsel with a view of Mr. Pierce's pre-offense deterioration. "From 1985 through 1989, Michael seemed to be deteriorating. He lost his job at the post office, he lost his car, his marriage ended, he was having continuing problems with our parents and seemed more frustrated than ever. He also stopped taking care of himself." Declaration of John Pierce, ¶ 5 (A-532–533).

For a number of years prior to the offense, Mr. Pierce worked for the United States Postal Service. In the time just before the offense, as his behavior in general deteriorated, his behavior towards postal customers and his supervisors became increasingly disturbed. He stopped keeping regular attendance, for which he was disciplined. He began to act in an odd manner which manifested itself in "angry outbursts" toward customers and supervisors. In May, 1986 he was disciplined as the result this disturbed exchange with a postal customer:

> Mrs. Betty Smith, a postal patron at 3850 Woodhaven Road, Phila., Pa., advised that on Saturday, May 31, 1986 at approximately 2:43 P.M. she attempted to speak with you in reference to a notification slip left for Certified letter. She states that you did not ring the bell or knock at the door. As she ran down Woodhaven Road, she saw you come out of the bushes and she called to you. You turned, saw her, and began to walk faster. She called to you again; you turned around and made a lewd gesture with your finger to her. Mrs. Smith caught up to you and asked for the letter. You turned toward her threateningly and yelled loudly "Fuck you lady"; you quickly repeated it three more times. You told her: "You ain't getting it lady. I'm late and I'm hot and tired and if you know what's good for you, you'll get the Hell away from

me." Mrs. Smith was extremely frightened by all of this and ran from you.

(A-325). Not too long after this episode, he engaged in another such outburst:

> On Friday, August 22, 1986 at approximately 1:45 pm. Mrs. E. Koschak, postal patron at 3854 Grant Avenue Philadelphia, PA asked you not to leave mail at two specified houses because the occupants had moved. Mrs. Koschak further advised you that someone may take the mail and you could get in trouble. You told Mrs. Koschak that once you 'put mail in the box you no longer care about it" and that she should 'sit on her ass' because you knew what to do. Mrs. Koshak's son overheard your comments and told you not to speak to his mother like that. At this time you made several statement perceived by Mrs. Koschak as 'smart' remarks to her son. Additionally, you made a gesture which was described by Mrs. Koschak as placing your 'hand on the private part of his body and shake it to her son.' She stated she was sitting near her son and grandson at the time.

(A-325). Mr. Pierce was the subject of disciplinary proceedings and based upon these incidents and his deteriorating attendance record, he was discharged from the Postal Service.

5. Evaluations Conducted at the Request of Habeas Counsel.

When undersigned counsel were appointed to represent Mr. Pierce, he continued to deny that he was mentally ill and refused undersigned counsels' requests that he submit to a mental health evaluation.[13] Faced with this dilemma, counsel provided the above-summarized records to two psychiatrists, Dr. Robert Sadoff and Dr. Larry Rotenberg. Based on these documents, each of these psychiatrists opined that Mr. Pierce was suffering from paranoid delusions and psychosis, and that the records raised questions about his competency to proceed in habeas and at the time of trial. Dr. Rotenberg stated:

> The question of whether he was competent to stand trial or whether he was criminally responsible at the time of the trial is certainly a major issue. . . Most certainly at this

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[13]Mr. Pierce agreed to counsels' suggestion that he undergo neuroimaging at the University of Pittsburgh Medical Center. Counsel offered this as an alternative to seeing a mental health expert. While eschewing mental health evaluations, Mr. Pierce was willing to undergo imaging because of his desire to find the transponder he believes was implanted in his brain. *See Petition*, at p. 30 n.5.

> point in time, he seems to be progressively more psychotic, more bizarre, and more paranoid.

July 21, 2002 Report from Dr. Rotenberg to counsel, A-515-527, at A526-527.

Dr. Sadoff stated the following:

> It is clear that there are questions of Mr. Pierce's mental state at the time of the commission of the act . . . and at the time of trial. What is tragic is that he is now appearing to be deteriorating on death row in prison. His communications appear to be delusional and he appears to have some hallucination regarding what is happening to him and his appearance in prison.

October 3, 2002 Report of Dr. Sadoff to counsel, A-528-531, at 531.

Counsel also presented the above-described documents to Alan Tepper, JD, Ph.D., a clinical psychologist, who had been retained in state post-conviction proceedings in 1997 by Mr. Pierce's then counsel, Bernard Siegel. As related in Dr. Tepper's report to undersigned counsel, Mr. Pierce refused to be evaluated at that time. However, based upon the records presented to Dr. Tepper by undersigned counsel, and Dr. Tepper's brief conversation with and observations of Mr. Pierce from 1997, Dr. Tepper found a "strong likelihood that Mr. Pierce was suffering from a severe mental illness that would affect his ability to control his powers of judgment and reasoning. . . [and his history] raises questions regarding Mr. Pierce's past competency to stand trial. . ."[14]

Although Mr. Pierce did not wish to be evaluated by a mental health professional, he was willing to be seen by a medical doctor in order to document his various medical complaints, including that guards were performing surgery on him, and to locate the transponder that he believes

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[14]Dr. Tepper's Report is not included in the Joint Appendix, however it was provided to the District Court as Attachment "B" to *Petition for Involuntary Commitment to a Forensic Psychiatric Facility* (District Court document # 30). It is included in *Petitioner's Supplemental Appendix* at SA-007-009 filed with the Court of Appeals.

is implanted in his brain. Undersigned counsel therefore engaged Dr. Robert Fox to conduct a medical examination of Mr. Pierce at the State Correctional Institution at Greene. Dr. Fox is a board certified psychiatrist, and as such he is also a medical doctor. Dr. Fox visited Mr. Pierce on August 23, 2002, introduced himself to Mr. Pierce as a medical doctor, and asked him to explain the nature of his physical complaints. As the following excerpts from Dr. Fox's subsequent report reveals, Mr. Pierce is deeply disturbed, delusional, psychotic, and certainly not competent:

> The interview lasted for about 2.5 hours during which time Mr. Pierce spoke freely. He required little prompting throughout the interview, and his speech was significantly pressured.
>
> He went on to describe in exact detail the way in which the guards had damaged his body, changed the way he looks, and sexually violated him. **He has created an elaborate and internally consistent delusional construct as to how these changes to his body and the sexual violation were accomplished.** He claims that the guards do these things to him while he is asleep. He believes that the guards have perfected a way to alter his appearance without leaving any physical trace that they had conducted these procedures. Included in the changes to his appearance that he described was the loss of his hair, and surgical changes to his nose and face.
>
> * * *
>
> He described how he believed these things were done to him. He believes they are done while he sleeps and he knows he has been drugged by the guards so they could do these things to him. He pointed to what he claimed were puncture wounds on his arms, which he claimed were evidence of the drugging. I saw no evidence of any such wounds (old or new) but he insisted that he sees them all the time. He also claimed that the guards can puncture his skin while he sleeps because he is being "heavily sedated through the air vent." He also described being poisoned through his food, which he can tell has been tampered with because it is often "slippery." He says that at times "the milk tastes like metal." He also went into a very long discourse as to how the toast that he was receiving had been contaminated because it was damp on one side or the other.
>
> While I obviously did not believe that he had been subjected to surgical procedures performed by the guards, throughout the interview I conducted physical examinations of the portions of this body that he claimed they were altering. So, for instance, I examined his hairline, nostrils, and arms. I saw no evidence that he had been subjected to any surgical procedures such as he described.

He also related an elaborate description of how he had been brainwashed while in prison, the culmination of which occurred at Huntingdon Prison. He told me that he had undergone an electroencephalogram during which a "radio transmitter" or "transponder" had been implanted in his brain. Following this implantation he began to hear a voice speaking to him. He said the first time that he heard it the voice said, "Hi, Mike. I know telepathy like you. I'm a genius, too." He indicates that he has been hearing this voice continuously since 1992 when the "transmitter was implanted."

He believes that he was under FBI surveillance while he lived in California in 1987 and 1988. During this period he drove a cab and indicates that he heard a different set of voices which he believed were those of federal agents watching him. He made a connection between those voices heard in California and the one he has heard since the early 1990s.

I tried repeatedly to get Mr. Pierce on track or to structure the interview. This was nearly impossible.

He finally related to me that the things that were being done to him were being done for a specific reason. He believes that the prison officials want him to look different from the way he really looks, and they want him to look like he was "crazy" so that nobody will take his complaints seriously. He is clearly convinced that he is an extremely powerful and important person meriting this special treatment at the hands of the authorities. He described how through mental telepathy he has been able to send information to the United States military to create new weapons in the war against terrorism.

Despite not performing a formal mental status examination in the course of discussion I was able to form some impressions and make a number of observations. . . . His thinking revealed paranoid and grandiose delusions as described above. His associations are significantly loosened. He described auditory hallucinations in great detail. Although his speech appeared to be logical and consistent on a superficial level, it is quite obvious that it is his **delusions** that are logical: that is, there are internal consistencies to his delusional thoughts.

Due to the obvious presentations of Mr. Pierce's pathology, I was able to form a number of psychiatric opinions to a reasonable degree of certainty. Mr. Pierce today is suffering from chronic Paranoid Schizophrenia. In addition, on the basis of his report of symptomatology, as well as evidence from background collateral sources, I can say with a reasonable degree of certainty that this paranoid psychosis has existed from at least as early as 1986 or 1987, and probably prior to that time. In addition, from the late 1970's through his incarceration in 1989, he has suffered from polysubstance dependence with particular use of alcohol, amphetamines and cocaine.

Excerpts from Declaration of Dr. Robert Fox, A-497–508.

Counsel provided Dr. Fox's report to Dr. Rotenberg, who issued a second report.[15] Dr. Rotenberg opined that the content of what Dr. Fox reported:

> is a manifestation of the increased severity of his illness and his continued deterioration. . . [A]ll of the delusions that he has, regarding his body being invaded, regarding being molested, regarding his food being poisoned, regarding transponders being implanted into him – all of these are manifestations of severe and unremitting psychosis.

Dr. Rotenberg likened Mr. Pierce's beliefs that people are not who they say they are to a variant of Capgras Syndrome:

> in which the individual becomes so psychotic, that he believes that people are not who they say they are, and believes that he is not who says he is, or as in this variant, that the time span and that the experiences within a time span, have somewhat been falsified for unknown and delusional purposes.

D. Undersigned Counsels' Application to the District Court for Involuntary Commitment.

Pursuant to the District Court's order, counsel filed a habeas petition on December 10, 2002. It contained a small number of claims that counsel could glean from the record, and those related to Mr. Pierce's obvious mental health deficits. However, counsel reported to the District Court that in their view, based upon all of the above summarized information, including the opinions of four mental health professionals, that Mr. Pierce was not competent to proceed. Counsel advised the District Court that the *Petition* therefore did not contain all potential claims, as counsel were frustrated in their investigative efforts because of Mr. Pierce's incompetency. They also advised the District Court that they would be moving for an involuntary sixty day commitment of Mr. Pierce for

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[15]Dr. Rotenberg's second report is not included in the *Joint Appendix*, but it too was attached to *Petition for Involuntary Commitment* (District Court document # 30) as Exhibit "A" and it is included in *Petitioner's Supplemental Appendix* at SA-010-012 filed with the Court of Appeals.

psychiatric diagnosis and treatment:

> Counsel have spent months attempting to break through Mr. Pierce's shroud of delusions, and his bizarre and highly tangential thinking. Counsel and their investigator has visited with Mr. Pierce at SCI – Greene for dozens of hours trying to discuss the facts of this case and his prior lawyers' representation of him.
>
> It is undersigned counsels' view that Mr. Pierce is currently not competent to litigate this case. Counsels' presentation therefore is limited to only the mental health claims that are supported by the above described records and opinions, and three other claims that are apparent from the record . Even then, counsels' mental health presentation has been severely handicapped by Mr. Pierce's ongoing inability to cooperate with counsel.
>
> Counsel respectfully believe that this Court must take steps to fully explore the extent of his illness. Counsel are at their end in this regard. They have done everything within their power and knowledge to obtain the cooperation of this very ill man to fully explore these issues. Counsel now needs the help of the Court. Petitioner should be committed to a secure prison hospital for a period of at least sixty days in order to determine the extent of his illness and to have him observed and evaluated by mental health professionals. Counsel will formally move for this relief in a separate filing. In the meantime, counsel present the following claims for relief based upon what they currently know.

See Petition at ¶¶ 44, 46, 47.

Shortly after filing the habeas petition, undersigned counsel filed a motion styled *Petition for Involuntary Commitment to a Forensic Psychiatric Facility for Long-Term Evaluation* (District Court document # 30). The Commonwealth filed written opposition to this motion, arguing, among other things, that the Court "must find out what Mr. Pierce wants to do" before considering a commitment. Commonwealth's *Response to Motion for Involuntary Commitment* (District Court document # 36) at 7. In a *Reply Memorandum* (District Court document # 38) at 11-14, undersigned counsel did not oppose the Commonwealth's request that the Court hear from Mr. Pierce, but made plain that Mr. Pierce denied that he was mentally ill and did not wish to be evaluated. Counsel offered to stipulate to these facts, and questioned the utility of hearing from him at that point. *See*

Petitioner's Reply to Respondents' Response Regarding Motion for Involuntary Commitment (District Court document # 38) at page 11 ("While counsel have no objection to this course, it is unnecessary because counsel already know what Michael Pierce wants to do: **he does not want to be evaluated and instead wants to litigate the claims that have percolated from his deluded mind.** In order to avoid the time and expense of hearing from this psychotic man, counsel will stipulate that Mr. Pierce currently does not wish to be evaluated.") (emphasis in original).

After considering the *Habeas Petition*, the request for *Involuntary Commitment* (along with the above records), and the fact that Mr. Pierce did not wish to be evaluated, the District Court found that "Petitioner might presently be incompetent and thus be unable to at present rationally assist counsel" (A-10) and ordered that Mr. Pierce be temporarily committed to determine whether he is mentally ill, suffers from paranoid schizophrenia, and is competent to proceed.

After reviewing the extensive documentation presented to the District Court and the state court record, the Court of Appeals concluded the Commonwealth's appeal did not fit within the narrow confines of an appealable collateral order and dismissed the appeal for lack of jurisdiction. In doing so, the Court stated: "[I]mportantly, the final judgment rule promotes efficient judicial administration by emphasizing the deference an appellate court owes to the district court's decisions on the many questions of law and fact that arise before judgment." Pierce, 467 F.3d at 369.

ARGUMENT

THE DISTRICT COURT'S ORDER GRANTING THE PETITION FOR INVOLUNTARY COMMITMENT TO ASSESS MR. PIERCE'S COMPETENCY WAS PROCEDURALLY SOUND, AND WAS NOT SUBJECT TO INTERLOCUTORY APPEAL.

The District Court had before it a "reasonably strong showing" that Pierce may be incompetent to rationally assist counsel. Pierce, 467 F.3d at 367. The District Court also knew that

Pierce would refuse to be evaluated and would continue to assert he was not mentally ill. The District Court invited the Commonwealth "[t]o identify a forensic psychiatrist to participate in an evaluation of Pierce's current competence to participate in his capital litigation." Id. at 368. The Commonwealth refused.[16] In light of the overwhelming evidence presented to the District Court concerning Mr. Pierce's inability to rationally assist habeas counsel, the court did not abuse its discretion in ordering that he be evaluated. Indeed, whether there is reasonable cause to believe that a criminal defendant is competent at the time of trial, is left to the discretion of the district court. United States v. Zhou, 428 F.3d 361, 381 (2d Cir. 2005); United States v. General, 278 F.3d 389, 396 (4th Cir 2002); United States v. Downs, 123 F.3d 637, 641 (7th Cir. 1997), Newfield v. United States, 565 F.2d 203. 206 (2d Cir. 1977). There should be no different rule in habeas corpus proceedings, where this Court has held that a district court has discretion to temporarily commit a state capital prisoner to a secure mental health facility to determine competency to proceed with a habeas corpus challenge to his conviction and death sentence. Rees v. Payton, 384 U.S. 312 (1966).

In Rees, this Court remanded a habeas case to the district court with directions to consider the competency of the habeas petitioner by, among other things, committing him to a secure facility for 60 days to determine his competence to make litigation decisions. See also Streetman v. Lynaugh, 835 F.2d 1521, 1525 (5th Cir. 1988) (Supreme Court "cite[d] for support by analogy the federal statutory provisions presently codified at 18 U.S.C. §§ 4241-4247 that authorize a federal district court in a federal criminal prosecution to order" such commitments when a defendant's competency to stand trial is at issue).

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[16] The Court of Appeals also noted that "[T]he Commonwealth cannot refuse to participate in the proceedings below and then expect the court of appeals to intervene. Cf. Cohen, 337 U.S. at 546 ("Appeal gives the upper court a power of review, not one of intervention").

As with trial competency, Rees affords the district court "a measure of discretion in determining the type and extent of procedures necessary to decide the issue of competency." Mata v. Johnson, 210 F.3d 324, 327 (5th Cir. 2000). See 18 U.S.C. § 4241(a) (a district court may order a temporary commitment if there is "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent").

Nonetheless, the Commonwealth complains that the procedures employed by the District Court – relying on the state court record and voluminous documentary and written submissions to establish "reasonable cause"that Mr. Pierce may be incompetent and unable to rationally assist counsel – violated Mr. Pierce's right to due process and that the commitment order falls within the purview of Vitek v. Jones, 445 U.S. 480 (1980).

The Commonwealth is wrong. Mr. Pierce was not required to prove incompetence in order to secure an evaluation – he simply had to demonstrate reasonable cause to believe he was incompetent and unable to rationally assist counsel, which was done. Moreover, Vitek is readily distinguishable. The issue in Vitek concerned a determination by prison officials, pursuant to a state statute, that an inmate was mentally ill and could not receive proper treatment in the penal complex and thus was transferred to a mental hospital for treatment. Vitek, 445 U.S. at 484. Under the state statute at issue, the inmate could be transferred to a facility for "examination, study and treatment..." Id. at 483. This Court held "[N]one of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and subject him involuntarily to institutional care in a mental hospital." Id. at 493.

In this case neither the District Court nor the Court of Appeals placed the stigmatizing label "mentally ill" on Mr. Pierce. Nor did the District Court commit him for involuntary treatment in a

mental hospital, as was the case in Vitek. The District Court, faced with a habeas petitioner who admittedly would not cooperate with a competency evaluation, and faced with "a reasonably strong showing that Pierce was acutely mentally ill," Pierce, 467 F.3d at 367, and unable to rationally assist counsel, properly exercised its discretion to have Mr. Pierce evaluated.

The Commonwealth also asserts that the District Court failed to appropriately "confront the rulings of the state court," *Petition* at 20, and presume the sole competency finding from 1989 negated the wealth of evidence presented to the District Court in 2002, which established reasonable cause to believe Mr. Pierce may be incompetent and unable to rationally assist current counsel. There is but one notation in the entire state court record concerning Mr. Pierce's competency. See NT 10/16/90, at 20 ("on 12/8/89, the defendant was found competent, and Mr. Wallace requested a continuance for further preparation"). There were not, as alleged by the Commonwealth, "numerous hearings and reviews," *Petition* at 15, concerning Mr. Pierce's competency. In fact, there were none. No litigation whatsoever took place in state court concerning Pierce's competency. A competency finding that is eighteen (18) years old and predicated only on a brief encounter with Mr. Pierce and a review of his pending charges is at best, stale. See Mata v. Johnson, 210 F.3d 324, 332 (5th Cir.2000) (district court erred when it based a finding of competency to waive further federal review on a twelve-year old finding where there was also evidence of recent irrational behavior).[17] More to the point, the 1989 evaluation was included in the material presented to the district court for its consideration in determining whether Mr. Pierce had established "reasonable cause" for a current competency evaluation.

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[17] See Report of Dr. Eric Becker (A-63) (noting that the "source of information" relied on was Petitioner's rap sheet). This evaluation is unreliable.

Thus, in view of the age of the "finding," the unreliability of the so-called evaluation, and the current evidence of Mr. Pierce's psychotic state and lack of capacity, neither the District Court, nor the Court of Appeals owe the 1989 competency finding deference such that standing alone, would preclude the District Court from making a contemporary inquiry into competency.

The cases relied upon by the Commonwealth to suggest that the Court of Appeals erred in concluding that the Commonwealth could not take an interlocutory appeal are distinguishable. As a general rule, a party to an action in federal court "is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of error at any stage of the litigation may be ventilated." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994); 28 U.S.C. § 1291. Apart from certain statutorily enumerated exceptions that are inapplicable here, only a "small class" of interlocutory orders are immediately appealable through the "collateral order doctrine." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

The Commonwealth maintains that a civil commitment order, or an order that results in the detention of a pre-trial defendant for an evaluation, who would otherwise be at liberty, fits within the Cohen exceptions. However, those instances are distinguishable from Mr. Pierce's case. What makes the order "important" and therefore subject to interlocutory appeal in the case relied upon by the Commonwealth, is the significant diminution in liberty resulting from the order. That diminution is missing in this case.

For instance, in United States v. Deters, 143 F.3d 577 (10th Cir. 1998), the defendant, who was pending trial and not incarcerated, was ordered by the district court to submit to an in-custody competency and sanity evaluation. Id. at 578. The Court framed the issue as "not whether there were grounds to conduct a psychiatric examination, but whether the defendant should have been **confined**

during the examination." Id. at 580. Under these circumstances, the Court held that the commitment order may be immediately appealed. Id. at 581.

Likewise, in United States v. Rinaldi, 351 F.3d 285 (7th Cir. 2003), upon filing a motion for reconsideration of the denial of his request to withdraw his plea of guilty due to the discovery that he suffered from Adult Attention Deficit Disorder, the court ordered a forty-five (45) day custodial examination to determine whether he did in fact suffer from a mental disease or defect at the time of the offense. Id. at 286. Not surprisingly, the Tenth Circuit concluded this order was immediately appealable because "[t]he order would be virtually unreviewable because there would be no effective relief for Rinaldi's loss of liberty during the period of commitment." Id. at 288.

In United States v. Davis, *93 F.3d 1286* (6th Cir. 1996), the Court concluded that the district court erred in ordering defendant, at the behest of the prosecution, involuntarily committed to assess her competency without first establishing "reasonable cause" to question her competency. Id. at 1290.

Finally, in United States v. Weissberger, *951 F.2d 392* (D.C. Cir. 1992), the Court upheld the propriety of an immediate appeal under the "collateral order doctrine" of an order "requiring confinement and psychiatric evaluation" Id. at 396, where the defendant challenged the Magistrate Judge's authority to issue such an order *sua sponte*. *Id.* at 395. The Court ultimately found the order for commitment and evaluation, under the facts of the case, proper.

None of these cases support the Commonwealth's novel proposition that the District Court's order moving Mr. Pierce from death row to a hospital is "important" enough to depart from the rule that a party should take an appeal at the end of the litigation. The District Court's conclusion that Mr. Pierce established "reasonable cause" to believe he may be incompetent and unable to rationally

assist current counsel, and its subsequent order for commitment for a competency evaluation given Pierce's historical recalcitrance to cooperate in such matters, fits within the collateral order doctrine.

Nor did the Court of Appeals take the cavalier attitude attributed to it by the Commonwealth that because Mr. Pierce is already incarcerated, traditional liberty concerns may not be at issue. Rather, the Court of Appeals concluded "[t]he Court's order...is a temporary measure to accomplish a specific and finite goal, that is evaluation, within the confines of custodial setting, and it is not clearly beyond the discretion of the District Court in aid of its jurisdiction." Pierce,467 F.3d at 373.[18]

Of course, there is something disturbing, if not perverse, in the Commonwealth standing up for the purported violation of Mr. Pierce's liberty interest. The Commonwealth, after all, is duty bound to defend the sentence of death and to execute Mr. Pierce. Obviously, the Federal Public Defenders appointed by the District Court to represent Mr. Pierce have his interests at heart, and are duty bound to advocate in his best interests. There is no due process issue here requiring immediate appellate review, except for the one that lives in the mind's eye of the Commonwealth.

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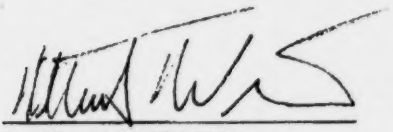
[18]The Court added that "[i]f Pierce is found to be competent after evaluation, then habeas counsel will be appropriately guided in regard to presenting 'his claims' to the District Court." *Id.*

CONCLUSION

For the reasons stated above, Mr. Pierce respectfully request that this Court deny the Commonwealth's *Petition for Writ of Certiorari.*

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2007, I served two copies of the above brief upon the following person by First Class Mail, postage prepaid:

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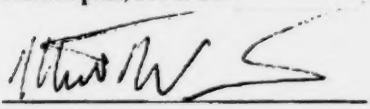

Michael Wiseman